MICHIGAN SUPREME COURT

PUBLIC HEARING
JANUARY 16, 2003

JUSTICE CORRIGAN: Good afternoon, be seated and welcome to our public hearing on administrative matters which we regularly schedule here. All of the individuals who appear today, we're grateful to have your input. What I would like to remind you is that we limit your presentation to 3 minutes and we adhere rather strictly to that but for the Justices' questions so we appreciate you being here but we attempt to move these proceedings along and ask you to "cut to the chase". All right, the very first item in front of us is our file 2001-33 which deals with the general topic of settlement conferences.

Item 1: File 2001-33 - MCR 2.401, 2.410, 2.506 AND 7.213 SETTLEMENT CONFERENCES

MR. KANTOR: Good afternoon Your Honor and members of the Court. I'm here to speak in opposition to the good faith participation requirement of the amended court rule 2.401 and its companion sections of the ADR rules. I should tell you first I was supposed to have come to stand beside Amy Glass, the chair of our section, and she was going to make her presentation but she called me this morning at 5:10 to tell me she had gotten a case of the flu and would ask that I come on her behalf. But I know if she were here she would agree with these points. Mediation is a very successful process. It is successful for essentially three reasons. Self-determination. It's a voluntary process. The parties have a right to decide what they want to do, negotiate as they see fit in their best interests, even to make decisions which in our view might be stupid or in bad judgment or not in their best interests but they have that right. The second principle is confidentiality of the process. That whatever is said, even in the existing rule, in the context of negotiations, is confidential. Can't be made public in any hearing or public body. The third principle upon which mediation rests and upon which it is so successful is the neutrality of the mediator. He or she doesn't decide who is right or wrong, does not make qualitative judgments or credibility judgments and it is that neutrality that enables the mediator to do his or her job well. Now what does the good faith participation requirement do. What is good faith. If I as a litigant, though I am there to participate in negotiation but want to reject a demand, want to make no offer because I had in my own best interests a motion for summary disposition that I intend to file or is pending--

JUSTICE CORRIGAN: Mr. Kantor just so you're aware, your time is up. Make your concluding remark.

MR. KANTOR: This rule undermines and subverts the three principles that provide the foundation for mediation and I urge this Court to strike that good faith participation provision from the rule.

JUSTICE CORRIGAN: We appreciate your presence. We have a number of letters that we've received on the same score so the points are well taken and the Court appreciates your input. Thank you. Steven Silverman.

MR. SILVERMAN: Good afternoon. I'd like to follow up on what Mr. Kantor didn't get to say regarding good faith in the other contexts, Court of Appeals and in summon(?) conferences. I also rise on behalf of AAA Michigan to oppose that language and I would like to offer some rhetorical questions about good faith as Mr. Kantor just did. Is a plaintiff acting in good faith when, as it could actually in a recent case involving AAA, plaintiff's counsel acknowledges to the court in a summon conference that the defendant's offer is reasonable but his client insists on going to trial. The flip side is what happens when a defendant, as Mr. Kantor pointed out, has a motion for summary disposition, doesn't want to participate because he or she wants to have the motion decided before some negotiations are engaged in. And finally, the one I find most troubling, is in the context of the Court of Appeals because as any party in the Court of Appeals acting in good faith when it declines to reach a settlement because it wants to have a question of law definitively resolved by the Court of Appeals. There may be great reasons to factually settle the case but there are other cases that would turn on the Court of Appeals or this Court's determination of the question of law. If that actually does constitute good faith and I think the language is simply superfluous, it's harmless because of course we do have standards in the trial courts. We have case evaluation sanctions, we have offer of judgment sanctions. There is a calculus that litigants and attorneys have to engage in anyway without this language. So in passing upon these proposed revisions I hope this Court won't strike in its entirety any notion of what I consider a femoral and indefinable good faith requirement that really at the end of the day is going to be difficult if not impossible to enforce. I would, if I had just a few seconds, like to compliment the Court in its addition of the words "other persons" in who can participate in these proceedings because it permits attorneys who have some authority to not have to drag from across the country claims adjusters or vice presidents of companies or whatever. Thank you for your time.

JUSTICE KELLY: We don't count against your time compliments.

MR. SILVERMAN: Thank you Justice Kelly.

JUSTICE CORRIGAN: Thank you Mr. Silverman. We have no one signed up to talk on our second item. We are on Item 3 now, 2001-48, certain amendments suggested to the Court of Appeals rules.

ITEM 3 - 2001-48 - COURT OF APPEALS RULES

MS. TOMBERS: Good afternoon, Your Honors. As far as agenda item 3 goes, the amendment to 7.215(I)(4), the Court of Appeals clerk not taking late motions for reconsideration, we support that. We figure that just codifies current practice. We do oppose, however, the proposed amendment to 7.217(D) reducing the time for a motion to reinstate after a dismissal from 56 days to 21 days. Sometimes dismissal notices get to the parties so late and the dismissals come so late that it's even to late to file the application for leave to appeal. That's our first concern is that this avenue, or any appellate avenue, would then be closed to the litigants. But more practically these administrative dismissals generally result when there has been an attorney meltdown of some sort, either was the experience with one of our members. The attorney had simply stopped opening his mail and the client didn't get notice of the dismissal for 8 weeks. I had to step in in one instance where the attorney had a psychiatric problem and the clients didn't get notice and deadlines had been blown. The client needs more than 3 weeks to first to learn about the dismissal, sometimes it takes longer than that; find a new appellate attorney, get that new appellate attorney up to speed and then file the motion to reinstate. If the Court has an idea to put the general file it within 3 weeks but we'll give you 56 days, we would proposed alternative language to the existing court rule and suggest that the Court simply add "if a motion to reinstate is filed more than 21 days after the notice of dismissal, it must be accompanied by an affidavit explaining the delay." And that would give the Court then some discretion about whether or not to accept the filing between the 22 days and the 56 days.

JUSTICE KELLY: This is 7.219?

MS. TOMBERS: 7.217(D).

JUSTICE KELLY: 7.217(D). And you're saying--say that again please.

MS. TOMBERS: If you were so inclined to try and get a 21-day average or file it within 21 days but we will give you up to 56, the proposed alternative language would be if a motion to reinstate is filed more than 21 days after the notice of dismissal, it must be accompanied by an affidavit explaining the delay.

JUSTICE YOUNG: So you're talking about a discretionary reinstatement after 21 days.

MS. TOMBERS: Yes. Thank you.

JUSTICE CORRIGAN: Thank you Ms. Tombers. We have no persons who have asked to speak on our item 4. Item 5 is 2001-38, MCR 8.116. These would be standards for closing the courtroom.

ITEM 5 - 2001-38 - MCR 8.116 COURTROOM CLOSING

JUSTICE CORRIGAN: The first speaker I have is Dawn Phillips-Hertz from the Michigan Press Association.

DAWN PHILLIPS-HERTZ: Thank you, Your Honor. May it please the Court, as you may know, I serve as general counsel to the Michigan Press Association. I have with me today their executive director, Michael McLaren, and their director of public affairs, Lisa McGraw, who are here with me today. As you know, MPA proposed this rule and at that time I submitted a memorandum of law and a letter. I do have extra copies if any of you are interested but to indicate to you that this rule is drafted nearly reflects what we believe to be the status of the law, as that memorandum demonstrates. It of course pulls together the fact that this right of access to court proceedings is something which has been recognized as being a right of constitutional dimensions under the First Amendment of the United States Constitution. And Michigan has always been a court that has been in the forefront of providing public access to its courts and in fact the Michigan Compiled Laws provide that court proceedings are to be open. Nevertheless there are times when closure or partial closure is appropriate and the courts have devised a procedure by which a trial judge is to evaluate the right being asserted and then to determine whether or not that right is superceded or is equal to the First Amendment and then decides how to treat the situation if there is found to be two compelling interests that are in opposite. And that is the most important thing that this amendment would do is it would direct trial court judges to look at the aspect of how do we fashion a procedure that will protect the right being asserted which requires closure and the right of the public which demands access. Too many times the parties are focused on is it open or closed rather than finding a middle ground that accomplishes the best thing for the public and the litigants. This Court has already created this process in Rule 8.119 which deals with sealing court files. This proposed amendment would simply restate this in 8.116 which talks about court sessions. The reason we brought the rule forward is currently many lawyers and lower court judges are not aware of the constitutional implications of closing a hearing. And as a result judges and litigants are confronted with an issue with which they are not familiar at a very inconvenient time. Usually at the beginning of a court proceeding when there are juries to be selected and exhibits to be marked and motions in limine to be held. Here comes the media and here comes the public who wants to have access. What happens then is we spend a lot of time trying to educate everybody as to what the rights are and inevitably it ends up costing judicial time not only in the lower court but quite often there are appeals and those appeals are almost always emergency appeals and they often find their way to you. So by adopting this rule what we think you

will do is provide clarity and guidance to the lower court judges and lawyers so that the public's right of access is maintained and the courts and the litigants can focus on the issues that they have and get forward with conducting a fair trial. So again we urge the adoption of this rule. We think it is nothing but a restatement of the law as it is and that it will further the interests of all.

JUSTICE CORRIGAN: Thank you Ms. Hertz. The Court appreciates your submission in this regard and has taken it under consideration and in fact we have seen no opposing filings to this so thank you very much for invoking the rule-making procedure.

DAWN PHILLIPS-HERTZ: If I may make one little comment. Jim Brady was supposed to speak this afternoon. He is in court in Eaton County at 1:30. He is going to try to be here before 3:00. He's at a very short motion, he will try to get here but he's not here now. Because he is a former prosecutor and defense lawyer and I thought he might be able to give you something from that perspective.

JUSTICE CORRIGAN: Very well. Thank you. Michael Hirton, Lansing State Journal.

MR. HIRTEN: Thank you very much. My colleague just spoke about the technical issues but I'm going to speak more for the issues central to our editorial pages and our new broadcasts. We see an alarming trend of more secrecy with government and we worry about it. We have a federal government now that promotes secret trials and lack of access to legal counsel in the name of national defense. And I'm just here to reinforce what I believe is the peoples' need for an open and accessible court system. I believe the secrecy in court proceedings breeds cynicism and is ultimately destructive and in fact it's very unnecessary. Our system is really worthy of the peoples' scrutiny at all levels, the openness, and we should welcome it and I think we do. These rules offer protection where necessary but at their core they reinforce the high standard of an open judiciary. They provide valuable guidance for judges, they reaffirm the peoples' right to watch over the courts and all that they represent. So we support them completely and ask you to continue to promote the idea of openness because without it we're worried.

JUSTICE KELLY: I appreciate your concerns. Do you come to us with any specific instances of concern about secrecy in the courts in Michigan today.

MR. HIRTEN: We have the same issues. I don't have particular ones but it’s the issues that Ms. Hertz raised. The need to go in, we believe that the right ultimately exists and the courts reaffirm that right but it's the process. It's the cost and it’s the time before we get to that issue that ultimately a larger paper like mine, we'll go to court and fight with it. But there are smaller organizations--there are people who don't have those

resources who can be hurt by this and this I think simply reminds judges that in fact yes it should be open so keep it open and I think it helps people that way.

JUSTICE MARKMAN: Sir can I just say I appreciate your comments but openness, I just want to call to your attention that the process itself in which you are currently participating is evidence I think of our commitment to that. It wasn't very many years ago when we didn't have this process. But right now any member of the public, anyone who is interested in any one of our administrative proposals has got the right to come in during these hearings and share with us their perspectives on these proposals so I hope you understand this is part of what I think is a broader commitment to the kind of openness you're talking about.

MR. HIRTEN: I agree and I think we in the press should wave the flag for this kind of openness and demand people use it.

JUSTICE YOUNG: Including your reports.

MR. HIRTEN: Absolutely. There is a big platter here for everybody and we'll be here more.

JUSTICE CORRIGAN: Thank you very much. Steven Borowiak.

MR. BOROWIAK: Good afternoon superintendents of the Supreme Court. While these distinguished colleagues of the press certainly have enumerated certain constitutional issues and I'll just reiterate them. One, under the Michigan Constitution all courts are supposed to be courts of record and two, all court rulings are supposed to be available free for the public. Now I know that they are not available free for the public so I'll close my statements. Thank you. Have a good afternoon.

JUSTICE CORRIGAN: Thank you. Next item is Item 6.

ITEM 6 - 2001-58 REPLY BRIEFS IN SUPREME COURT

MS. TOMBERS: Good afternoon again. The section has some concerns here with the proposed amendments to 7.302 and 7.306 and the concern is that the Court has in the past been so open to receiving as much information as it possibly can before it decides a certain issue that we are afraid that by adopting by reference 7.212(G) that the parties will be limited to just one reply brief at the application stage, and it's been at the application stage where traditionally the Court has accepted as much information as it can on the significance of the issue. We're also concerned with 7.306 for two reasons and they appear to be opposite one another. First, the appeal briefs on the eve of oral argument, the 21 days would be a good thing because getting a reply brief on the eve of oral argument

for the appellee certainly makes it different to first analyze the reply brief and then try and figure out a way to respond to the reply brief and prep for oral argument at the same time. On the other hand, sometimes this Court does schedule its oral arguments within a very short time of the end of the briefing schedule, not giving a party 21 days to file a reply brief and if that were the case then the parties would have that time to file. So while these different reasons seem a bit inapposite, we basically would urge the Court, if you're merely codifying what your current practice is, and want to make it known to the public that the reply brief process is available in the Court, simply say reply briefs may be filed without the time limit on it. Otherwise we are concerned that you will no longer accept the information that we've been providing you with as frequently as we have been providing it.

JUSTICE YOUNG: What makes you think that untimely filed reply briefs have an impact.

MS. TOMBERS: I'm sorry? Untimely filed reply briefs?

JUSTICE YOUNG: Late. If they are filed so late that we can't really use them, what value are they.

MS. TOMBERS: Oh, no, what I'm thinking about is in the application process where the parties consistently update the Court on anything new that has come out, that sort of thing, before the application is decided. I know the Commissioner's Office frequently will update its Commissioners Reports to the Court and let the Court know that these supplemental briefings have occurred. And we would just ask that that would be allowed to continue so that we could still provide you with that information.

JUSTICE KELLY: And your feeling is that if it comes in at the last minute and doesn't influence us for that reason that that's something you can deal with.

MS. TOMBERS: No, I know the Court has consistently looked at those last minute briefs, even if it's after oral arguments. That if the reply brief is filed on the eve of oral argument, yes the Justices, you have it for oral argument. I know it's an imposition to ask you to prep for it the night before and just take a quick look at it, but during your opinion writing process that those briefs are actually looked at.

JUSTICE YOUNG: My conclusion is most of those are just late. There is nothing in them that is of any particular emerging circumstance. They just aren't filed timely.

JUSTICE KELLY: Some of us might burn the midnight oil in preparing for oral argument and see them.

MS. TOMBERS: And that was my experience too, many years ago, was burning the midnight oil before oral argument. And I understand Justice Young your concern with a late filing but if there is that chance that that reply brief somehow holds some sort of new information, I think the Court should have it.

JUSTICE YOUNG: And then the party can move specially. If it's that important and that late, then perhaps the party should move for its acceptance.

MS. TOMBERS: But why, Your Honor, I would think that would be adding an extra layer to the process that isn't there now that would be--

JUSTICE YOUNG: No, what we've trained people to do now by virtue of having no rule is to file it whenever you want, file a reply anytime you want.

MS. TOMBERS: And we appreciate the ability to do that.

JUSTICE YOUNG: I bet you do.

JUSTICE CORRIGAN: Thank you Ms. Tombers. And Mr. Silverman.

MR. SILVERMAN: This is almost like oral argument now. I'd like to, rather than repeat what Ms. Tombers said, I'd like to discuss the questions that were raised by Justices Young and Kelly and that is regarding late filing of reply briefs. To me the fact that we are aware that we take a chance that this Court may not actually look at them, read them, pay attention to them, is a reason that motivates us to not file, without the necessity of a rule, reply briefs on the eve of oral argument. And I think that the rule speaks to something that I think the section is concerned with and practitioners are concerned with too and that is the growing tendency to try and have efficiency in the system overwhelm the need to have as much information as possible for a court of last resort.

JUSTICE KELLY: Form over substance?

MR. SILVERMAN: Well I think that when we do this, we have no recourse except for a motion for reconsideration which is not to just say we disagree with you and I think the situation that the trend to following kind of the Court of Appeals where the circumstances in terms of the workloads of the courts and the fact that the Court of Appeals can't control its own docket because it has to take appeals as of right. They can't just say no, we're not going to listen to you. But this Court can control and does control its docket. It decides which cases are of such significance that if it should be heard by this Court, this Court also uses its powers to grant preemptory relief in lieu of

granting leave to appeal or filing per curium opinions in lieu of granting leave to appeal. So I think--

JUSTICE CORRIGAN: Just to take issue with that statement, the burden on the ordinary Justice in terms of the actual workload of the seven of us is far greater on this Court than it is on the Court of Appeals. As a conglomerate, fine, the Court of Appeals may have more filings but individual three-judge panels do not, so the effort to organize work and give us the opportunity to actually find out what's in a reply brief in a timely fashion, analyze it and maybe even ask questions about it at oral argument is an opportunity I value in light of our entire workload.

MR. SILVERMAN: Well I think then perhaps if we're looking at it that way then perhaps language such as, I don't know if you're proposing that, Justice Young, but to suggest that perhaps reply briefs may be filed in accordance with the Court of Appeals system, I have problems with the page limits for the Supreme Court because that's in there too. If we're going to follow the rule it's not just the time limits, it's the page limits, but to put language in there that permits late filings or further filings by motion. And I think if practitioners were aware that this is the set-up, that you can still try to do this and ask the Court to consider it, at least then we feel that we're taking on behalf of our clients in the Supreme Court our best shot at giving you all the information that we think, that you may not think--

JUSTICE YOUNG: I'm impressed two different ways. One, I'm surprised, given some of the things that come up in oral argument, there aren't more requests by counsel to brief a specific issue. That almost never happens. And the other concern I have is the way we have trained the practitioners in this Court is you submit it any time and we'll take it up. I find it even more difficult before we grant to have things come in so late they really have no impact. And I think it's an important discipline the people who practice or represent amici in this Court know that in order to have an impact you get your materials in earlier rather than later, especially before granting leave.

MR. SILVERMAN: It is beyond the scope of this hearing to discuss amicus briefs but I will point out that the rules sometimes, the way they're set up--

JUSTICE YOUNG: I mean reply briefs, I'm sorry.

JUSTICE CAVANAGH: Mr. Silverman, do you think that by inserting a provision in recognizing this practice that it will in effect institutionalize it and that appellate lawyers are going to feel obligated to come up with a reply brief and bill their clients for it.

MR. SILVERMAN: I think you certainly have--we always think we should all have the last word in everything, even though you do have the last word, but I think there is an incentive when you have the opportunity, to file again even if, as Justice Young pointed out, sometimes the contents of what is filed again probably are not worthy of this Court's consideration.

JUSTICE CORRIGAN: Thank you Mr. Silverman. Next item is Item 7.

ITEM 7 - 2002-22 MCR 3.206 ATTORNEY FEES

MR. JOHNSON: May it please the Court, I'm Blaine Johnson. I'm a sole practitioner from Jackson, Michigan. I'd like to start out this way. This is my first time at the Hall of Justice. This is a magnificent facility. Thank you very much. I'm here to speak in favor of the proposed court rule, actually the amendment to the court rule for awarding attorney fees in domestic relations actions wherein there is a clear ability of a divorce litigant to comply with a divorce order yet the litigant does not. In my opinion the amendment would encourage respect for the law, it would give an incentive to comply with a court order or judgment, it would be a disincentive to violate a court order or judgment. It would also compensate what I term and deem a victim, that is somebody who has already been awarded a specific something by virtue of a court order or judgment and then has to pay a lawyer in order to go back into court to obtain it. This Court clearly has the constitutional, legislative authority to enact this particular amendment. I view this as not--

JUSTICE MARKMAN: Sir you say we plainly have that authority. Where does it come from.

MR. JOHNSON: Your Honor, I believe it comes from the Constitution where it says this Court has the authority to make rules and promulgate rules and procedures for all courts, but for trial court to be able to impose attorney fees. There is a statute, MCL 552.13 which I'm amazed most lawyers that I talk to aren't even aware of--

JUSTICE MARKMAN: Can we reverse the American rule on attorneys fees under that guise.

MR. JOHNSON: Clearly not, no. I'm not saying I believe this kind of court rule would actually be any kind of adoption of an English court rule versus the--

JUSTICE YOUNG: Why isn't it an encroachment on the American rule.

MR. JOHNSON: I don't believe it would be. I view this as more of a case management kind of attorney fee amendment as opposed to for example a new cause of

action or actually a new method of jurisprudence, of saying no we're going to adopt the English rule as opposed to the American rule. But I believe we have enough appellate law at this point where we shouldn't have to have this a court rule. You've got Ashbrenner v Ashbrenner, Morrow v Morrow, big case, very good cases. However many judges are reluctant to award attorney fees to make somebody whole in a situation that we're talking about here. This particular court rule should be a specific remedy, I believe, it's a specific remedy to cure a specific evil. And I see my time is up.

JUSTICE CORRIGAN: Thank you Mr. Johnson, thanks for coming today.

ITEM 8 - 2002-32 MCR 2.502 NO PROGRESS DISMISSALS

JUSTICE CORRIGAN: Richard Bisio from the Civil Procedure Committee of the State Bar.

MR. BISIO: Good afternoon, may it please the Court, I'm appearing here on behalf of the State Bar Civil Procedure and Courts Committee. And our committee recommends against adoption of this amendment for two reasons. First the no progress rule to begin with has only a very limited applicability. It doesn't apply if there's an order for a scheduling conference, an ADR proceeding or a trial date and virtually every case, and I think the rules require this, has some type of scheduling order or a scheduled trial date. So the no progress rule starts with a very, very limited applicability to begin with. In those rare cases where it does apply, allowing a party to initiate a no progress procedure just is unnecessary because the rules already adequately provide for other methods of bringing a case to the court's attention if it hasn't been scheduled or it's not making progress. For example a party can request a pretrial conference or they can move for sanctions including dismissal if it's appropriate if the opposing party is in violation of a court order and discovery sanctions can include dismissal if it's appropriate if a party is not cooperating in discovery. So the rules already deal with whatever this amendment, I think, is calculated to look at. And we're aware of no reason why the rule should be expanded to invite new motions when essentially someone disagrees with the (inaudible).

JUSTICE CORRIGAN: As I recall the history of this rule, part of the problem is sometimes in the computer systems of courts things get lost for a long time and sometimes when the attorney is tracking the case it may be helpful to jar the court's memory on some of these things so it looked like a glitch in the rules to us. That's what I saw as the sort of housekeeping reason for this rule. What do you see as the down side to that. What's bad about it.

MR. BISIO: I think it invites lawyers who are already more contentious than necessary I think, to attempt to put pressure on another side by bringing this type of

motion and increasing litigation expenses. If for example in the situation you're suggesting, a case hasn't been scheduled because of some computer glitch or something, the way to bring it to the court's attention is to request a pretrial conference, a scheduling conference, or make a motion for a conference and get it on the proper track by asking the court to do what it should have done in the first place which is enter a scheduling order. So there is already an avenue in the rules to deal with that.

JUSTICE CORRIGAN: All right, we understand your position. Thank you. And Evelyn Tombers, State Bar Appellate Practice Section, you're back up again.

MS. TOMBERS: We just wanted to register our support for the amendment. We think that the notion of allowing a party to request a dismissal when there hasn't been sufficient progress would help move things along in the courts.

JUSTICE KELLY: What about Mr. Bisio's concern. What comment have you on that.

MS. TOMBERS: We were thinking that, I understand that there are quite a few contentious attorneys and it might increase the costs of litigation but on the other hand, as Justice Corrigan pointed out, if there has been some sort of a glitch or if an attorney is intentionally dragging his or her feet we could use this as a method of moving things along.

JUSTICE CORRIGAN: All right, thank you Ms. Tombers.

ITEM 10 - 2002-37 ELECTRONIC FILING STANDARDS

JUSTICE CORRIGAN: Finally Item 10. Our file 2002-37, electronic filing standards. Judge Shelton.

JUDGE SHELTON: Good afternoon, may it please the Court, I'm here today in a different capacity. I'm here as what's known in Washtenaw County as that techkie geek judge from Ann Arbor to talk about electronic filing. Actually I am here in three separate capacities. First of all I do represent the State Bar of Michigan Electronic Filing Task Force which I chaired for some time and in which I'm currently the vice chair. Secondly I'm here on behalf of the Washtenaw County Electronic Filing project and we have recently joined with Kent County in pursuing the joint electronic filing project between our two counties. As finally I'm here as the technology editor for the American Bar Association Judges Journal. Having said all that I'm not going to ask for 9 minutes and I'll conclude my comments in 3. The thrust of my comments is first to urge you to adopt these electronic filing standards. They do represent the best practices from around the nation as compiled by the National Center for State Courts. Justice Young may recall

having met Mr. McMillan at one of our tag meetings from the National Center for State Courts and he is one of the prime drafters of these electronic filing standards and I think the person who knows the most about electronic filing in the country. I would urge you to adopt them. Having standards is very important to the State Bar as well. The State Bar feels it's important that we have guidelines to guide each of the local courts so that attorneys across the state can really function in one court of justice irregardless of the location.

JUSTICE CORRIGAN: Can I ask you a question, though. Don't we need to effectively personalize these standards to Michigan rather than just adopt the national standards where they are now. Don't we need to specify them.

JUDGE SHELTON: We looked at that issue. I think these standards are broad enough so that we don't need to. I think there are some specific items and I'm going to propose two. There are some specific items that I would suggest be stricken because they're not appropriate to be standards here but I'm suggesting that the standards be adopted, that they be the guidelines for what will then be in effect demonstration projects. Before any of these can go into effect it's going to take cooperation from this Court and from the Supreme Court Administrator's Office (sic), perhaps from the Legislature, before they can really go into effect but I think these will be the standards for the demonstration projects that we use so at least we all know that we're headed down the same road as we investigate these. The two specific provisions I wanted to suggest to you have been included in our written comments--

JUSTICE YOUNG: Acrobat in one of the--

JUDGE SHELTON: Yes. The first is 1.1b which relates to the use of PDF. I have nothing against Adobe Acrobat PDF but I strongly urge that no electronic filing standard be set which ties us to a proprietary piece of software--

JUSTICE YOUNG: I didn't think the national did that. It struck me, I didn't notice that until you brought it to my attention. Why do you think the national did that.

JUDGE SHELTON: Well what they really said is it's become the de facto standard. I would agree that that's true for the federal courts and it is very easy right now for the courts to use PDF. Our position is that courts may decide internally to use PDF as a way of handling documents but that should not be the filing standard. We should not require people to purchase someone's product in order to participate in our judicial system. That's our concern and I would ask you to strike the language of the de facto standard for electronic filing today from those provisions. I wanted to make one other request for a change and that is as to 1.2d which suggests that electronic filing

would only take place when the clerk's office was open, in essence. And that seems to us to be unnecessary and really to impinge on one of the benefits of electronic filing and I would ask you to strike that. Finally, I wanted to comment on the confidentiality issues that are raised here, and that is Standard 3.7. Contrary to what they say, we do urge that electronic filing allow the redaction of individual data fields. That's a geeky way of saying that there is certain information in court file documents contrary to the views of press representatives here, that ought not be freely available to anyone who has a computer. Social Security numbers and other types of information. Part of our pilot project relates to the use of electronic filing in personal protection orders. And there are other confidentiality issues, some of them represented by the Domestic Violence Project and the submission to you that we agree with. So we would urge that rather than saying an entire file has to be suppressed or not suppressed, that individual fields within those files would be redacted and it's going to take cooperation from this Court and the Legislature as well to decide which of those ought not be made available. I'm going to conclude, unless there are questions, by urging you to, with these small modifications, adopt these electronic filing standards. I also request and urge you to be flexible and to urge the administrative office to work with the various projects underway to be flexible in varying court rules, getting us the amendments, perhaps on a pilot project basis, to try these items out in selected areas so that we can assist in seeing how these standards will work in Michigan before they actually become adopted.

JUSTICE KELLY: I have just one question Judge Shelton. With respect to your recommendation about striking language pertaining to the particular software to be used, you and I both remember over the years the great diversity from court to court in this state of practice caused by differing local rules and I'm concerned that by allowing local courts to choose their own software we'll have repetition of this diversity which will make it confusing and difficult for members of the bar to know in what locality they should use what software.

JUDGE SHELTON: Actually I was not urging that. I was actually urging that we not allow courts to pick any particular proprietary software and require attorneys to file in that method. Without getting too technically complex there's a (inaudible) called XML or Legal XML which now allows for an open filing so that anyone who has access to the internet can indeed file a document with a court. How the court elects to treat that document internally I think is a matter for local decision. But it's the external that I'm concerned about and we want to ensure that these standards embrace an open architecture for that so that filing can take place from a local library for unrepresented litigants or from a computer in the clerk's office at a desk or at a table, any of those things that would ensure access to the court. We are dedicated to the idea that electronic filing should be used to increase access to our judicial system and not allow it to decrease.

JUSTICE CORRIGAN: Certainly to state for the record from my understanding of it, part of the huge issues confronting us in the technology area is the problem that we have all these different computer systems throughout Michigan and attempting to unite them in our court system and connect them is one of our huge challenges.

JUDGE SHELTON: It is indeed. I would just say that I, like you, would certainly like all of our case management systems to be connected in the courts, our view is that's not necessary before we begin electronic filing and again the idea being that anyone can file and how we choose to treat it internally may be a different matter.

JUSTICE CORRIGAN: Thank you, Judge Shelton, for coming today. Terri Stangl, Access to Justice Task Force.

MS. STANGL: Good afternoon. I'm here on behalf of the Access to Justice Task Force, the Access to Justice work group of the Open Justice Commission and the Standing Committee on Legal Aid. We also support the idea of having standards for Michigan for e-filing. We recognize it shows great promise as a tool for use by the courts. Our comments which are also submitted in writing go to certain pieces that we feel will help that system work better for certain populations that are using the courts. First I want to talk about who should be exempt from e-filing. The proposed standards, and Section 1.3b sets out a list of who should be exempt and we generally agree with that although we do have some slight wording suggestions such as using the phrase "persons with disabilities" as opposed to disabled. We also suggest that added to that list which includes self-represented litigants and indigent litigants should be persons with limited English proficiency as well because unless the system is really multi-lingual that will be a barrier to them for the foreseeable future. We also want to touch on how the system is going to work with respect to waiver of fees. As the Court knows, in order for indigent persons to file a case they do a petition for waiver of fees which is reviewed either by a clerk or the judge before the case can actually get filed. In the standards in Section 1.2c there are several suggestions around that and perhaps the standards could set out a couple of alternative ways that courts could look at but be sure to plan for. This could be exemption from the process. It could be initial exemption and then being allowed to use filing, or it could be a provisional receipt which would then be activated as a filing once there's a ruling on the petition. So those are three methods but there should be some recognition in the standards to guide local courts on how to implement this. We also feel that if the process depends on a debit or credit card then there needs to be a way for people who can only pay cash. Some people are outside that electronic payment system. There also needs to be--

JUSTICE CORRIGAN: How do you propose to receive cash through a computer.

MS. STANGL: I think that would have to be done initially by the clerk and then perhaps given a temporary access code to allow them to file if they wish to use the electronic filing system.

JUSTICE YOUNG: You may have to pay in advance and then debit against what's one file.

MS. STANGL: Well my understanding is in some of the electronic systems being used what allows someone to pay the court fee using a credit card number or some--

JUSTICE YOUNG: A contemporaneous--

MS. STANGL: Correct. And some low income people, not necessarily indigent, don't have those tools. So perhaps they could bring a money order to the clerk of the court, say I want to file a case. And either that should be exempt from the process, that's one alternative--

JUSTICE YOUNG: You're coming to court to pay and then you go home and do the e-filing.

MS. STANGL: Right. I'm talking about something like a temporary authorization code that you could sort of be given access to the computer system. I'm not a technology person--

JUSTICE YOUNG: It just strikes me as your proposal makes no sense. If you have to go physically someplace to pay, you may as well make the filing.

MS. STANGL: Right, but the question is if a local court has a mandatory process and you don't happen to be one of the people who is exempt, you're not indigent but you don't use electronic credit cards, how do you access the courts. So I think it would be a very small number of people but I'm looking at those who are not exempt. Now an easy way to take care of it is to exempt people who want to pay cash. If they want to pay cash I agree with you, Justice Young, they should be able to file right there and that would take care of it. But if we're looking at--

JUSTICE YOUNG: Do you understand the system as precluding paper filing.

MS. STANGL: The standards allow a court the option of mandating e-filing as long as there are exemptions for certain groups. I suspect in practice most

courts will make it voluntary and that's probably the better way to go. But if this Court adopts 1.3b which says you may mandate, this is a feature to be considered. Finally, clearly there are many implementation issues and I think it would be helpful to suggest in the comments that local courts involve persons who are familiar with these special populations to be involved in an implementation setting process. I think you will avoid problems later down the line if those heads get together up front. Thank you.

JUSTICE CORRIGAN: Thank you Ms. Stangl. Did Attorney James Brady arrive.

MS. ??: No Your Honor.

JUSTICE CORRIGAN: All right. That's the last witness we have. We thank you all for joining us this afternoon.